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3
4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

6 * * *

7 UNITED STATES OF AMERICA,

Case No. 2:04-CR-148 JCM (LRL)

8 Plaintiff(s),

ORDER

9 v.

10 JEFFREY MICHAEL DONNELLY,

11 Defendant(s).
12

13 Presently before the court is petitioner Jeffrey Michael Donnelly's motion to vacate, set
14 aside, or correct sentence pursuant to 28 U.S.C. § 2255. (ECF No. 42). The government filed a
15 response (ECF No. 44), to which petitioner replied (ECF No. 46).

16 Also before the court is the government's motion for leave to advise the court of relevant
17 new authority. (ECF No. 45).¹

18 **I. Facts**

19 On December 22, 2004, petitioner pleaded guilty (without a plea agreement) to one count
20 of felon in possession of a firearm under 18 U.S.C. § 922(g)(1). (ECF No. 27). The PSR calculated
21 petitioner's guideline range as 188 to 235 months and recommended a sentence of 235 months.
22 (PSR at 85, 98).

23 On April 7, 2005, the court sentenced petitioner to 188 months in custody (low end of the
24 guideline range), followed by five (5) years supervised release. (ECF No. 34). Petitioner was
25 advised of his rights to file an appeal. (ECF No. 34). The court entered judgment on April 18,
26 2005. (ECF No. 36).

27
28 ¹ As an initial matter, the court grants the government's motion for leave to advise the
court of relevant new authority.

1 In the instant motion, petitioner moves to vacate the sentencing enhancement applied to his
2 sentence pursuant to *Johnson v. United States*, 135 S. Ct. 2551 (2015) (“*Johnson*”), and requests
3 that the court resentence him to 57 months. (ECF No. 42).

4 **II. Legal Standard**

5 Federal prisoners “may move . . . to vacate, set aside or correct [their] sentence” if the court
6 imposed the sentence “in violation of the Constitution or laws of the United States . . .” 28 U.S.C.
7 § 2255(a). Section 2255 relief should be granted only where “a fundamental defect” caused “a
8 complete miscarriage of justice.” *Davis v. United States*, 417 U.S. 333, 345 (1974); *see also Hill*
9 *v. United States*, 368 U.S. 424, 428 (1962).

10 Limitations on § 2255 motions are based on the fact that the movant “already has had a fair
11 opportunity to present his federal claims to a federal forum,” whether or not he took advantage of
12 the opportunity. *United States v. Frady*, 456 U.S. 152, 164 (1982). Section 2255 “is not designed
13 to provide criminal defendants multiple opportunities to challenge their sentence.” *United States*
14 *v. Johnson*, 988 F.2d 941, 945 (9th Cir. 1993).

15 **III. Discussion**

16 In the instant motion, petitioner requests that the court vacate his erroneous sentencing
17 enhancement pursuant to *Johnson* and resentence him to 57 months. (ECF No. 42). In particular,
18 petitioner argues that his three prior Florida convictions for aggravated assault, robbery, and armed
19 robbery no longer qualify as “violent felonies” for purposes of the fifteen (15) year mandatory
20 minimum sentence under the Armed Career Criminal Act of 1984 (“ACCA”). (ECF No. 42 at 4).

21 The court disagrees. In *Johnson*, the United States Supreme Court held the residual clause
22 in the definition of a “violent felony” in the ACCA, to be unconstitutionally vague. 135 S. Ct. at
23 2557. In particular, the Supreme Court held that “increasing a defendant’s sentence under the
24 clause denies due process of law.” *Id.* The ACCA defines “violent felony” as any crime
25 punishable by imprisonment for a term exceeding one year, that:

26 (i) has as an element the use, attempted use, or threatened use of physical force
27 against the person of another; or

28 (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another.*

1 18 U.S.C. § 924(e)(2)(B) (emphasis added). The closing words emphasized above have
2 come to be known as the ACCA’s “residual clause.” *Johnson*, 135 S. Ct. at 2555–56.

3 *Johnson* is inapplicable here because petitioner was not sentenced under the ACCA’s
4 residual clause. More specifically, petitioner’s three prior felonies are violent felonies pursuant to
5 the force clause under 18 U.S.C. § 924(e)(2)(B)(i), without resort to the residual clause, because
6 all three felonies have as “an element the use, attempted use, or threatened use of physical force
7 against the person of another.” 18 U.S.C. § 924(e)(2)(B)(i).

8 Under Florida law, an “assault” is “an intentional, unlawful threat by word or act to do
9 violence to the person of another, coupled with an apparent ability to do so, and doing some act
10 which creates a well-founded fear in such other person that such violence is imminent.” Fla. Stat.
11 § 784.011. In turn, an “aggravated assault” is “an assault: (a) [w]ith a deadly weapon without
12 intent to kill; or (b) [w]ith an intent to commit a felony.” Fla. Stat. § 784.021. The Eleventh
13 Circuit has held that Florida felony aggravated assault qualifies as a “violent felony” under the
14 ACCA based on its elements. *Turner v. Warden Coleman FCI (Medium)*, 709 F.3d 1328, 1338
15 (11th Cir. 2013) (“[A] conviction under section 784.021 will always include ‘as an element the . .
16 . threatened use of physical force against the person of another,’ § 924(e)(2)(B)(i), and Turner’s
17 conviction for aggravated assault thus qualifies as a violent felony for purposes of the ACCA.”).

18 Under the plain language of Fla. Stat. § 812.13(1), a “robbery” includes as an element the
19 use of force against a person of another. Specifically, under Florida law, “robbery” is defined as
20 follows:

21 [T]he taking of money or other property which may be the subject of larceny from
22 the person or custody of another, with intent to either permanently or temporarily
23 deprive the person or the owner of the money or other property, when in the course
of the taking there is the ***use of force***, violence, assault, or putting in fear.

24 Fla. Stat. § 812.13(1) (emphasis added). The Eleventh Circuit has held that a Florida robbery
25 conviction under § 812.13(1) has as an element, the use, attempted use, or threatened use of
26 physical force against the person of another. *United States v. Lockley*, 632 F.3d 1238, 1245 (11th
27 Cir. 2011) (finding that defendant’s attempted armed robbery conviction under § 812.13(1)
28 qualified as the second predicate offense for the career offender enhancement); *see also In re Robinson*, 822 F.3d 1196, 1197 (11th Cir. 2016) (citing *Lockley* and concluding in an ACCA case

1 that the defendant's 1991 armed robbery offense has "as an element the use, attempted use, or
2 threatened use of physical force against the person of another"). Furthermore, the Eleventh Circuit
3 recently held that a Florida armed robbery conviction qualifies as a ACCA-violent felony under
4 *Lockley. United States v. Seabrooks*, 839 F.3d 1326, 1340–41 (11th Cir. 2016); *see also United*
5 *States v. Patterson*, No. 15-4112, 2017 WL 1208425, at *4 (6th Cir. Apr. 3, 2017) ("The Eleventh
6 Circuit ruled similarly in clarifying that Florida armed robbery is a violent felony.").

7 Based on the foregoing and under Florida law, petitioner's prior three felony convictions—
8 aggravated assault, robbery, and armed robbery—are "violent felonies" within the definition set
9 forth under the force clause of the ACCA, without resort to the ACCA's residual clause. Under
10 Eleventh Circuit precedent, a conviction for "aggravated assault" under Fla. Stat. § 784.021 and
11 convictions for "robbery" and "armed robbery" under Fla. Stat. § 812.13(1) include as an element
12 the "threatened use of physical force against the person of another" in accordance with the ACCA's
13 definition of a violent felony under 18 U.S.C. § 924(e)(2)(B)(i). Therefore, *Johnson* is inapplicable
14 to the instant case.

15 Accordingly, the court will deny petitioner's motion to vacate, set aside, or correct sentence
16 pursuant to 28 U.S.C. § 2255 (ECF No. 42).

17 **IV. Certificate of Appealability**

18 The court declines to issue a certificate of appealability. The controlling statute in
19 determining whether to issue a certificate of appealability is 28 U.S.C. § 2253, which provides as
20 follows:

21 (a) In a habeas corpus proceeding or a proceeding under section 2255 before a
22 district judge, the final order shall be subject to review, on appeal, by the court of
appeals for the circuit in which the proceeding is held.

23 (b) There shall be no right of appeal from a final order in a proceeding to test the
24 validity of a warrant to remove to another district or place for commitment or trial
25 a person charged with a criminal offense against the United States, or to test the
validity of such person's detention pending removal proceedings.

26 (c)

(1) Unless a circuit justice or judge issues a certificate of appealability, an
appeal may not be taken to the court of appeals from—

27 (A) the final order in a habeas corpus proceeding in which the
detention complained of arises out of process issued by a State court;

28 or

(B) the final order in a proceeding under section 2255.

1 (2) A certificate of appealability may issue under paragraph (1) only if the
2 applicant has made a substantial showing of the denial of a constitutional
right.

3 (3) The certificate of appealability under paragraph (1) shall indicate which
specific issue or issues satisfy the showing required by paragraph (2).

4 28 U.S.C. § 2253.

5 Under § 2253, the court may issue a certificate of appealability only when a movant makes
6 a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To make a
7 substantial showing, the movant must establish that “reasonable jurists could debate whether (or,
8 for that matter, agree that) the petition should have been resolved in a different manner or that the
9 issues presented were ‘adequate to deserve encouragement to proceed further.’” *Slack v.*
10 *McDaniel*, 529 U.S. 473, 484 (2000) (citation omitted).

11 The court finds that petitioner has not made the required substantial showing of the denial
12 of a constitutional right to justify the issuance of a certificate of appealability. Reasonable jurists
13 would not find the court’s determination that movant is not entitled to relief under § 2255
14 debatable, wrong, or deserving of encouragement to proceed further. Accordingly, the court
15 declines to issue a certificate of appealability.

16 **V. Conclusion**

17 Accordingly,

18 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that petitioner’s motion to
19 vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (ECF No. 42) be, and the same
20 hereby is, DENIED.

21 IT IS FURTHER ORDERED that the government’s motion for leave to advise the court of
22 relevant new authority (ECF No. 45) be, and the same hereby is, GRANTED.

23 DATED April 11, 2017.

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UNITED STATES DISTRICT JUDGE